**IN THE SUPREME COURT OF BELIZE, A.D. 2013**

**CONSOLIDATED CLAIMS NOS: 684 of 2013 & 685 of 2013**

**NO. 684 of 2013**

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| **BETWEEN** | **(SERGIO SANTANA** | **CLAIMANT** |
| | **(** | |
| | **(AND** | |
| | **(** | |
| | **(RFG INSURANCE COMPANY LIMITED** | **DEFENDANT** |

**NO. 685 of 2013**

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| **BETWEEN** | **(ROSENDO SANTANA** | **CLAIMANT** |
| | **(** | |
| | **(AND** | |
| | **(** | |
| | **(RFG INSURANCE COMPANY LIMITED** | **DEFENDANT** |

**Keywords:** Insurance Company; Insurance Act Chapter 251; Insurance Act 2004; Health Insurance Policies; Illegal Insurance Contracts and Policies: Insurer Acting with Authorisation or Approval;

Breach of Contract: Illegal Contracts.

**Before the Honourable Mr. Justice Courtney A Abel**

**Hearing Dates:** 16th September 2014;
8th October 2014;
14th November 2014.

**Appearances:**

Ms. Andrea McSweaney McKoy for the Claimants.

Ms. Naima Barrow for the Defendant.

**JUDGMENT**
**Delivered on the 14th day of November 2014**

## Introduction

[1] These consolidated claims result from the transfer to the Defendant of a portfolio of insurance policies by the Belize branch of the well-known Caribbean Insurance company CLICO (Bahamas) Limited[1] (hereinafter referred to as "CLICO-Belize") during its insolvency.

[2] The Claimants were holders of medical insurance with CLICO-Belize at the time of the transfer.

[3] Subsequently the Defendant found that these policies, for various reasons, were problematic to continue (including that they were not approved by the Supervisor of Insurance) and sought to cancel such polices; and offered the Claimants different and less favourable alternative policies which were not upgrades to their policies (as they had expected) and to their disappointment.

[4] The Claimants brought these claims alleging breach of contract and claiming reinstatement of the earlier contracts or damages.

[5] The Defendant contends, which the Claimants contest, that, as it would be contrary to the Insurance Act to issue a policy of insurance that is not approved by the Supervisor of Insurance, it is illegal for it (the Defendant) to do so and that the court cannot enforce a contract which is illegal and is therefore unenforceable.

[6] This case will have to resolve this dispute between the parties.

## Dramatis Personae (The Parties and Principals Actors)

[7] Mr. Brian Roe was at all times the Chairman of the Board of Directors of the Defendant, a body corporate licenced and governed by the relevant Insurance

[1] For the general background of the claim see: ACTION NO. 12 OF 2010: CLICO-Belize (BAHAMAS) LIMITED V THE SUPERVISOR OF INSURANCE; ATTORNEY GENERAL and RF & G LIFE INSURANCE COMPANY LIMITED as INTERESTED PARTY in which I delivered a Decision on the 6th March 2013.

Acts[2], and, as such, he at all material times presided at the meetings of such Board.

[8] Rhonda Lecky was at all material times the General Manager of the Defendant and, as such, was responsible for its management.

[9] The Claimant Rosendo Santana ("Rosendo") is a businessman and the owner of a bakery in Orange Walk District, Belize and the father of the Claimant Sergio Santana, the Manager of the said bakery, and the husband of the witness Dorita Santana.

[10] Sergio Santana ("Sergio") held a CLICO-Belize Medicash Diamond Health Insurance Policy No. 5100000101 dated 9th December, 2003 (hereinafter referred to as "the Medicash Diamond Policy") which had a maturity expiry date of December, 2081.

[11] Rosendo held a CLICO-Belize Single Public Servants Health Insurance Policy No. 5100000282 which had an effective date of 11th June, 2004 and a maturity expiry date of June, 2058 (hereinafter referred to as "the Public Servants Policy")

[12] Dorita Rosendo ("Dorita") at all material times was the family member in charge of managing the various insurance policies for the Santana family including Rosendo and Sergio.

**The Facts**

[13] The background and facts of this claim are generally undisputed and unchallenged[3].

[14] In late March 2009 the Supervisor of Insurance ("SOI"), Alma Gomez, approached Brian Roe through a fellow director of the Defendant, to enquire if the Defendant might consider acquiring the business of CLICO-Belize which consisted of individual life insurance, individual accident and sickness insurance,

[2] Although this has not been specifically pleaded and proved in this case it has not been raised as an issue and I do not believe it is disputed by the parties (indeed it appears to be assumed from the submissions of the parties) and in any event the above case supports this proposition.

[3] The Defendant did not consider that it was necessary and therefore did not wish to cross-examine the witnesses for the Claimant; and with what little cross examination took place of the Defendant's witness, Rhonda Lecky, it was determined by the court to summarily make findings of facts, as appropriate, in what follows.

individual annuities and group life, accident and sickness and annuity policies but excluding one of the plans of individual annuities known as the Executive Flex plan ("the CLICO-Belize policies").

[15] By this time CLICO-Belize had problems, culminating in regulatory intervention, which was widely publicized and discussed in the insurance press and at insurance gatherings.

[16] Mr. Brian Roe expressed a guarded interest and the SOI extended an invitation to meet her at CLICO-Belize, Belize City office, on the afternoon of April 6, 2009.

[17] The meeting took place and was attended by the SOI, a gentleman acting as Receiver for CLICO-Belize in that jurisdiction, another member of the Board and Brian Roe.

[18] At the meeting Mr. Brian Roe formed the opinion that the Defendant had been pre-qualified and was being offered the book exclusively.

[19] The two Directors of the Defendant (including Mr. Roe) confirmed that the Defendant was interested in the CLICO-Belize policies but that there were some serious considerations around their reinsurance arrangements that would have to be dealt with, not least of which was the "non-cancellation" clause in the CLICO-Belize Health policy.

[20] It was decided that the Defendant would submit a bid for the CLICO-Belize policies subject to the SOI agreeing that:

(a) each policy would be allowed to run to its natural renewal date – this meant that they would be undertaking some risks (for a short period) that they would not be able to "lay off" to reinsurers, and where, if there was a claim they might have to accept it "net" for their own account. They felt that this was an acceptable risk to take.

(b) all policies would be re-underwritten prior to expiration; and

(c) if the policyholder satisfied their underwriting requirements, they would be offered one of the Defendant's approved policies with terms closest to

their existing policy but which would not include a non-cancellation clause.

[21] The Defendant alleges that the SOI informed the Defendant that many of the policies sold by CLICO-Belize had not been approved by her as required by the Insurance Act, 2004[4], ("the Act") and that the Defendant would be given a one-year period in which the Defendant was to continue collecting premiums, seek scientific advice and have the policies approved by her.

[22] The Defendant acquired the CLICO-Belize policies but did not review the health policies prior to them being transferred, and seemed to have had the erroneous belief that such policies may have been or were annually renewable as was typical. The Claimants were not part of this discussion.

[23] The SOI instructed the Defendant to have all the CLICO-Belize policies that it intended to continue selling reviewed so that their Actuary could pre-certify the rates before and that she would then approve the revised policies and rates. The Defendant alleges that it was told by the SOI that the only policies that could be sold were those that had her approval and that it was agreed and understood that the Defendant would have the CLICO-Belize policies re-underwritten.

[24] The Defendant did as instructed and had a review conducted by its Actuary (P. Ngai).

[25] Again the Claimants were not part of the process of the review and re-underwriting.

[26] The Defendant had a Contingency Plan that outlined the intended procedure for the acquisition of the CLICO-Belize policies, which the Defendant presented to the SOI and which the Defendant alleges was approved by the SOI. This report included the Underwriter reviewing each case prior to renewal to determine if:-

(a) Contract can be re-underwritten, and

(b) Contract <u>needs</u> to be re-underwritten.

[4] Act. No. 11 of 2004

[27] By the terms of the Contingency Plan, the Defendant's Underwriting Department applied underwriting principles, followed the recommendation of the Defendant's Actuary, and also followed the general procedures for administering health insurance policies. It was specifically provided that policies would be re-underwritten over a one year period.

[28] Policyholders, whose policies were being discontinued, would be given notice that they should apply for one of their other approved policies.

[29] The Defendant's agents made direct contacts with these policyholders informing them of the decision and at the same time introduced them to their other medical plan options.

[30] The Defendant's directors were provided with a "Fact Sheet" and asked to provide as soon as possible a contingency plan explaining how they would handle the CLICO-Belize business should it be awarded to the Defendant. The SOI was to review the contingency plan immediately after which the Defendant would be expected to have an actuarial review and make an offer by July 15, 2009.

[31] The Defendant and the Judicial Manager of CLICO-Belize settled and agreed the terms of a written agreement and signed the written agreement on the 1st day of December, 2009 (hereinafter called "the Agreement") in the presence of the Judicial Manager, the SOI, and the Financial Secretary.

[32] By the Agreement the Defendant purchased the health and life insurance portfolio of CLICO-Belize which portfolio included the Medicash Diamond Policy and the Public Servants Policy ("the Health Policies") and the Judicial Manager, as agreed, transferred and assigned to the Defendant the benefits and burdens of the CLICO-Belize policies (including the Health Policies) with effect from September 2009.

[33] On the 12th day of February, 2010 this Court by an order dated the 12th February, 2010[5] confirmed the transfer of the CLICO-Belize policies to the Defendant.

[5] In Claim No. 281 of 2009: The Attorney General v CLICO (Bahamas) Ltd.

[34] As a result of the order of this Court of 12th February, 2010 the Defendant was vested with the property in the CLICO-Belize policies (specifically the Health Policies) including the benefits and burdens attached thereto.

[35] The Defendant was therefore at all material times, thereafter, the lawful transferee of the Health Policies.

[36] Following the review by the Actuary which had been undertaken on the instructions of the Defendant, in his report dated March 26th 2010, the Actuary stated:

> *"RF&G Life should discontinue selling Medicash series policies, Medicash Diamond, Medicash Emerald and Medicash Ruby policies as they can lead to a lot of abuses by policyholders and is hard to control (Page 11, Actuary's review of these policies)"*

Claimant Sergio

[37] Pursuant to the Medicash Diamond Policy, Sergio paid an annual premium of $1346.48 and was insured for a maximum of $400,000.00 on, inter alia, the following express terms and conditions:

(1) The Medicash Diamond Policy constitutes the entire contract of insurance and no changes thereto shall be valid until approved by an Officer of CLICO-Belize duly authorized by [CLICO-Belize] and unless such approval is endorsed and attached thereto. No agent has authority to change this Policy or to waive any of its provisions.

(2) CLICO-Belize shall be entitled to avoid the Policy if it shall have been obtained through any wilful misrepresentation or non-disclosure by or on behalf of [Sergio]

(3) The Medicash Diamond Policy terminates on the death of [Sergio].

(4) The Medicash Diamond Policy is renewable each year, subject to the consent of the underwriters who have the right to decline or to renew this Policy at the end of any Year or to make renewal subject to special conditions, if [Sergio] has at any time either misled the Underwriters by

misstatement or concealment or otherwise failed to observe the terms and conditions or failed to act with utmost good faith.

(5) A medical condition would not be considered a pre-existing condition if, among other things, [Sergio] had completed 12 consecutive months while covered under the policy.

(6) Benefits under the Medicash Diamond Policy will not be paid in connection with pre-existing conditions; and

(7) Benefits under the Medicash Diamond Policy shall not be paid for surgical correction, unless medically necessary, or non-medical treatment of obesity (e.g. dietary or exercise counseling for weight control).

[38] Thus if Sergio paid his premium and did not at any time either mislead the Underwriters by misstatement or concealment or otherwise fail to observe the terms and conditions or fail to act with utmost good faith the Medicash Diamond Policy was to terminate on the death of Sergio.

[39] By letter dated 14th April, 2009, Mr. Mark C. Hulse of Baker Tilly Hulse, the then Judicial Manager of CLICO-Belize wrote to Sergio advising him that:

> *"It is envisioned that in the liquidation process, the life and health insurance portfolio will be transferred to a life insurer licensed in Belize. We therefore strongly encourage you to continue paying your premium to ensure that you do not lose any of your future benefits. We have taken steps to ensure that you continue to enjoy the quality service you deserve …. Premiums can be paid into any Belize Bank branch countrywide in the name of CLICO-Belize (Bahamas) Limited A/C No. 635-1-1-9594 and identify to the Bank the policyholders for whom it is being paid. Alternatively, cheques can be delivered to the above listed agents. …. We take this opportunity to remind you that the age (length of time) on your policy brings more benefits, hence it would not be to your advantage to stop paying at this time. Be assured that we are working closely with the Supervisor of Insurance to*

*resolve the issues and will be taking swift and decisive actions to bring the matter to an early conclusion in the benefit of all policyholders".*

[40] By letter dated 1st September, 2009 the Defendant advised Sergio that effective the same date the insurance policies, excepting the EFPA policies[6], had been acquired by the Defendant, and that as a result, all premiums were to be paid to the Defendant and that arrangements were to be made to facilitate this process.

[41] The Defendant also pledged to provide Sergio, as a "Valued Customer", "with the same high level of service that our clients are accustomed to" and assured him that "as part of our mission, we pride ourselves in delivering a professional, efficient, and personalized service based on a strong financial and ethical foundation".

[42] Sergio duly paid his premiums to the Defendant, as was directed.

[43] Sandra Flores, an agent who had worked for CLICO-Belize and had been contracted by the Defendant, was assigned to Sergio's policy.

[44] In or around April, 2010, Ms. Sandra Flores, agent of the Defendant, spoke with Sergio and Dorita Santana and advised them that they were all required to update their personal data on their respective policies, and offered to increase their coverage to $1,000,000.00.

[45] It is disputed by the Defendant that Ms. Flores advised Sergio that his policy was required to be updated as to his personal information and that he could increase his insurance coverage from $400,000.00 to $1,000,000.00, and to effect the upgrade of information, the BELCARE form was to be signed.

[46] I accept that initially the increase in coverage was processed for Roberto Santana, another of the Santana family, and thereafter Ms. Sandra Flores offered the increase in coverage for others including Sergio and Rosendo.

[6] The subject of ACTION NO. 12 OF 2010 referred to in Note 1above.

[47] Dorita accepted the offer of increased coverage for all of them, but later realized, and informed Ms. Sandra Flores, that her policy and Rosendo's policy did not require an upgrade since their coverage was already $1,000,000.00.

[48] The Defendant contends that with the assistance of Ms. Flores, Sergio completed the requisite form to apply for the Defendant's Individual Health Policy which was a classic health policy that carried a higher Major Medical maximum than the Medicash Diamond.

[49] In or around June, 2010, and acting on reliance on the representations of Ms. Flores, Sergio signed the BELCARE form as required for his application to upgrade his insurance coverage from $400,000.00 to $1,000,000.00 and update his personal information.

[50] There is a dispute as to whether or not the Defendant informed Sergio that the Policy was canceled or discontinued but I accept Sergio's uncontested evidence that, in or around June, 2010, he signed the BELCARE HEALTH CARE INSURANCE form in blank for the purpose of updating his policy information, in accordance with Ms. Flores' instructions to him and his family.

[51] Underwriting was done and in consultation with the Defendant's re-insurers' underwriting guidelines Sergio's policy was declined due to obesity.

[52] The Defendant sought to assist Sergio by seeking an 'impaired risk cover' for him but without success. Had the Defendant been successful in obtaining impaired risk cover, such coverage would have had to be approved by the SOI, as the Defendant contends, as the Defendant could only sell policies approved by the SOI.

[53] Apparently, according to the Defendant, of the 147 Medicash Series policyholders which CLICO–Belize transferred to the Defendant, there were 89 Medicash Diamond Policyholders. Of these Medicash Diamond policyholders, only 2 were declined, 7 policyholders cancelled coverage, and 6 policyholders did not purchase the new policies; the other 74 policyholders were reinsured.

[54] After Sergio received the Defendant's letter, he replied by a letter dated 18th August, 2010 in the following terms:

*"Dear Mrs. Lecky,*

*I received cheque #004111 being refund for upgrading of medical insurance coverage being offered by Ms. Sandra Flores. As I understand it now, you have not only denied my upgrade, but have cancelled my medical insurance.*

*Ms. Sandra Flores visited Mrs. Dorita Santana at her office and she pointed out that based on the RENEWAL Clause, the policy was cancelled, so I'd like to know if it was part (1) or part (32) and the PROOF of either part.*

*I will appreciate that you provide this information in writing.*

*Thank you,*

*Sergio Santana"*

[55] Sergio did not receive a response to this letter.

[56] In or around August, 2010 Dorita Santana realized that additional premiums were nonetheless being charged by the Defendant for her husband's (Rosendo) and her medical insurance policies.

[57] Thereafter, by email dated 23rd August, 2010, Sergio's Mother, Dorita Santana, wrote to Ms. Flores, requesting among other things, the reason for the increase in his premiums since his coverage remained the same, and a history of the payments made on their 5 family policies.

[58] The Defendant again did not respond to these queries.

[59] By a letter dated 29th November, 2010, the Defendant through its Underwriter, Clarissa Thompson, notified Sergio as follows:

*"Your agent, Ms. Sandra Flores has been in contact with you regarding the discontinuation of the above-mentioned policy.*

*On June 28, 2010 you signed an application for a Worldwide Health Classic policy which was declined by our Reinsurer. A letter dated July 30, 2010 indicating the reason for the decline along with an*

*enclosed refund of premium was sent to you. Consequently, a management decision was made to keep you on the Medicash Diamond policy until December 31, 2010 allowing us to identify a policy that would possibly provide you with coverage. However, we were unsuccessful in our effort to do so.*

*We therefore, regret to advise you that coverage on your current Medicash Diamond Policy will cease on December 31, 2010. We have enclosed cheque # 00005029 for $118.94 which represents a refund of premiums paid in advance for the Medicash Diamond Policy.*

*Kindly acknowledge receipt of cheque by signing and returning the copy of this letter to our office at Gordon House, One Coney Drive, Belize City.*

*If you have any concerns, pleas feel free to contact us.*

*Sincerely"*

[60] In a letter dated 10th December, 2010, and in response to Sergio's Mother's email of 7th December, 2010, Mrs. Rhonda Lecky, for the first time claimed or suggested to Sergio that the Medicash Diamond health insurance policy was being, and could be, discontinued in accordance with the advice of its actuaries and reinsurers, and that the discontinuation was done in accordance with the Renewal Clause in the Policy. Sergio would therefore have to apply for alternative health insurance coverage.

[61] Sergio discussed the matter with his family and decided to seek legal advice on the matter.

[62] By letter dated 31st January, 2011 from Sergio's then Attorneys-at-Law Mesdames Samira Musa Pott & Co., threatened legal action against the Defendant if their policy was not reinstated by 10th February, 2011.

[63] The Defendant responded to the letter by a letter dated 18th April, 2011 through its Attorneys-at-Law Messrs. Barrow & Co. advising that the Defendant was unable

to renew his medical insurance with the same policy he had with CLICO-Belize as they would not be able to identify medical reinsurance coverage.

[64] By letter dated 5th May, 2011, Sergio's said then Attorneys-at-Law wrote to the Defendant on Sergio's behalf requesting the Defendant's position on the letter dated 14th April, 2009 by the Provisional Judicial Manager, wherein all CLICO-Belize policy holders were advised to continue making payments of their premiums to preserve their benefits.

[65] By letter dated 13th June, 2011 the Defendant through their Attorneys-at-Law responded to Sergio's letter of 5th May, 2011, declining to alter its stance on the matter.

[66] Since the cancellation of his insurance policy, Sergio had to seek medical attention in Florida, USA for sleep apnea and has had to bear the cost fully. This condition was at all times covered under the Medicash Diamond Policy.

[67] In addition Sergio has lost the security of a suitable health insurance policy which offered coverage up until the time of his death, as he has not been able to find an alternative Policy which is similar in cost and in coverage.

Claimant Rosendo

[68] Pursuant to the Public Servants Policy, Rosendo paid an annual premium of $1404.00 and was insured for a maximum of $1,000,000.00, on, inter alia, the same expressed conditions as Sergio in paragraph 37 above and in addition subject to the following term/condition:

> *"Benefits under the Public Servants Policy shall not be paid for surgical correction, unless medically necessary, or non-medical treatment of obesity (e.g. dietary or exercise counseling for weight control)"*

[69] Mr. Mark C. Hulse of Baker Tilly Hulse, the then Judicial Manager of CLICO-Belize, wrote to Rosendo an identical letter dated 14th April, 2009 as contained in paragraph 39 above; and by letter dated 1st September, 2009 the Defendant advised Rosendo in the same terms as contained in paragraph 40 above.

[70] Rosendo duly made payment of his premiums to the Defendant.

[71] Like Sergio, in or around April, 2010, Ms. Sandra Flores, agent of the Defendant, spoke with Rosendo Santana. It is likewise disputed by the Defendant that Ms. Flores advised Rosendo that his policy was required to be updated as to his personal information and his family's policies (excluding Rosendo) could increase in insurance coverage to $1,000,000.00, and to effect the upgrade of information, the BELCARE form was to be signed which was in fact an application for the Defendant's Individual Health Policy which was a Classic Health Policy with a one million dollar annual maximum.

[72] Apparently, according to the Defendant, of the 47 Public Servants Plan, 19 policyholders were reinsured; 18 persons stopped paying premiums causing their policies to lapse; and 10 persons did not accept the Defendant's equivalent policy.

[73] Underwriting was done and in consultation with the Defendant's reinsurers underwriting guidelines Rosendo's policy was approved - but excluding Lumbago, backache or anything related to this condition.

[74] As in the case of Sergio, in or around June, 2010, and acting upon and on reliance on the representations of Ms. Flores, Rosendo signed the BELCARE form as required for his application to update his personal information.

[75] The Defendant contends that Rosendo was advised of the terms of his approval but he declined coverage. There is a dispute as to whether or not the Defendant informed Rosendo that the Policy was canceled or discontinued but I accept Rosendo's unchallenged version that he was not.

[76] Thereafter in or around August 2010 Rosendo queried the Defendant as to the reason for an increase in his monthly premiums since his coverage remained the same ($1,000,000.00). The Defendant did not respond to Rosendo's queries.

[77] Again I accept Rosendo's uncontested evidence that, in or around June, 2010, he signed the BELCARE HEALTH CARE INSURANCE form in blank for the purpose of updating his policy information, in accordance with Ms. Flores' instructions to him and his family.

[78] By the same email dated 23rd August, 2010, as set out in paragraph 59 above, Rosendo's wife, Dorita Santana, wrote to Ms. Flores, requesting among other things, the reason for the increase in his premiums since his coverage remained the same, and a history of the payments made on their 5 family policies; to which the Defendant, it may be repeated, did not respond.

[79] Rosendo thereafter received a letter dated 8th November, 2010 from Gladys Kuylen, Underwriter of the Defendant, acknowledging receipt of his "*application for the Health Classic Plan*" and advising that the said new policy had been approved with a permanent exclusion of his lumbago/backache.

[80] Rosendo maintains that he did not apply for nor accept this new policy, which was more costly than his own and, more importantly, which afforded him significantly less coverage by excluding lumbago. I accept Rosendo's testimony on this matter.

[81] Rosendo's wife again wrote to the Defendant on 7th December, 2010, again reiterating their concern that they had been offered and had accepted solely an upgrade to his personal information, and not a completely new and less favourable policy.

[82] Rosendo maintains, which I accept, that he had never spoken with Ms. Sandra Flores or any other agent of the Defendant throughout this process.

[83] As noted in a letter dated 10th December, 2010, and in response to Rosendo's wife's email of 7th December, 2010, Mrs. Rhonda Lecky, on behalf of the Defendant, for the first time admitted that his category of health insurance was being discontinued in accordance with actuarial advice, and sought to justify the discontinuation of the policy on the basis that it was done in accordance with the Renewal Clause in the Policy, and that as a result, Rosendo would therefore have to apply for alternative health insurance coverage.

[84] Rosendo maintains, which I accept, that neither he nor his wife, who looks after the family's insurance business, at any time prior to 10th December, 2010 had

been advised by the Defendant or any of its agents that his health insurance policy had been discontinued or canceled.

[85] Rosendo testified that in her aforementioned letter of 10th December, 2014, Mrs. Lecky was of the view that the health insurance policy could be properly terminated solely on the advice of the Defendant's actuary and reinsurers, and that because he disagreed completely with Mrs. Lecky he therefore sought legal advice on the matter.

[86] By letter dated 27th January, 2011 the Defendant through its Underwriter Gladys Kuylen wrote to Rosendo giving notice that his "application" of 13th August, 2010 would be declined and premiums refunded if he did not accept or decline the offer of health insurance coverage excluding his lumbago/backache.

[87] As noted in relation to Sergio[7] there was an exchange of legal letters between the Santana family and the Defendant.

[88] Rosendo testified that as a family they have always tried to maintain insurance coverage on their lives and property, and therefore this situation has caused him great concern and distress.

[89] Rosendo added that fortunately, since the cancellation of his health insurance policy, he has not had significant medical bills, other than his regular checkups.

[90] Rosendo claims, however, that he has lost the assurance of having a suitable insurance policy with coverage up to the time of his death and that he has not been able to find any policy which is similar in cost and in coverage.

Sergio and Rosendo Generally

[91] Sergio and Rosendo both claim that in the circumstances of the case the Defendant unilaterally and unlawfully breached the Claimants' insurance contract.

[92] The Defendant contends that the Health Policies, and all other policies of that form, were cancelled because the Defendant was informed by the SOI that the

[7] Paragraphs 54, 64, 65, 66 and 67 above.

standard form of that policy had not been approved as required by Section 104 of the Insurance Act, 2004.

**The Court Proceedings**

[93] On the 17th December, 2013, the Claimants filed, in the present claims, Claim Forms and Statement of Claims in Support thereof in which they claimed the following reliefs:

1) A Declaration that the Defendant has breached the insurance contract dated 11th June, 2004.
2) An Order that the said Insurance Contract be reinstated; or
3) In the alternative, damages for breach of insurance contract.
4) Costs.

[94] On the 4th February, 2014 the Defendant filed Acknowledgments of Service on behalf of the Defendant.

[95] On the 28th February, 2014 the Defendant filed Defences in both claims.

[96] A case management conference was held on the 12th May 2014 at which both claims were consolidated and directions given for the trial of the consolidated claims.

[97] On the 11th July, 2014 the Defendant in the consolidated claims filed the witness statements of:

(a) Rhonda Lecky; and

(b) Brian Roe.

[98] On the 22nd July, 2014 the Claimants filed the following witness statements:

(a) The Claimant Sergio Santana
(b) The Claimant Rosendo Santana and
(c) The witness, Dorita Santana, the wife of Rosendo Santana.

[99] On the 10th June, 2014 the Defendant filed its List of Documents.

[100] On the 11th September, 2014 the Claimants filed their Summary of Legal Propositions For and on Behalf of the Claimants.

[101] On the 16th September, 2014 the consolidated claims came on for trial and with the consent of the parties the Witness Statements of the Claimants were admitted into evidence without the need for cross examination and the Witness Statement of Brian Roe was admitted into evidence without the need for his presence before the court subject to answers given by the witness Rhonda Lecky in cross-examination. Ms. Rhonda Lecky was then cross-examined and oral arguments were adjourned to the 8th October, 2014 with permission being granted for further written legal submissions to be filed and served on or before 30th September, 2014.

[102] On the 6th October 2014 the Claimants filed Further Legal Propositions on behalf of the Claimants.

[103] Generally as the facts were not in dispute the question for resolution of the court is a matter of law and its application to the facts.

[104] Needless to say that if either party feels aggrieved in what is set out above as the facts and that such facts do not properly and fulsomely represent the facts of the case then such facts may be considered findings of fact as part of the court's fact-finding function.

**The Law**

The Insurance Acts

The 1975 Insurance Act

[105] As I noted in the case of Action No. 12 of 2010[8] the statute laws applicable to insurance companies in recent years comprise a statute enacted in 1975 and known as Act No. 15 of 1975, which came into force on 19th July 1976 (herein referred to as "the 1975 Insurance Act"), and the other is the Insurance Act 2004 (hereafter referred to as "the 2004 Insurance Act"). Both are collectively referred to as: ("the Insurance Acts").

[8] Clico (Bahamas) Limited v The Supervisor of Insurance; Attorney General and RF & G Life Insurance Company Limited (as Interest Party) as in Note 1 above.

[106] I also set out in Action No. 12 of 2010 the applicable law[9] some of which is relevant to the present case: including concerning the legal framework under the Insurance Acts and more specifically the classes of insurance (including sickness and health insurance business), the position of the SOI, judicial management, winding-up and insolvency of insurance companies under the Acts (including Schemes of Arrangements for transfer of insurance business), and the need to obtain the approval of the SOI of any such scheme.

[107] I also noted in Action No. 12 of 2010 that the Insurance Acts have made provision for registered insurance companies, such as CLICO-Belize, and I might add also the Defendant.

[108] Section 97(1) of the 1975 Insurance Act provided as follows:

> *"A company shall not issue or accept any form of proposal or policy after six months from the commencement of this Act unless the standard form has been approved by the Supervisor, and the Supervisor shall not approve any such form if it is not in compliance with this Act or if it is likely to mislead a proponent or policy-holder."*

The 2004 Insurance Act

[109] Section 13(1)(c) of the Act provides as follows:

> *"If the Supervisor, after appropriate inquiry, or by the production of documentary evidence, or both, is satisfied in respect of the applicant insurance company that –*
>
> *(c) the company has made adequate and appropriate arrangements for the reinsurance of each class of insurance business which the company proposes to carry on in Belize, .....*
>
> *the Supervisor shall, either unconditionally or subject to such conditions as he may specify, license the insurance company in respect of such class or classes of insurance business, and shall notify the applicant accordingly, and shall by notice publish the licensing in the Gazette."*

[9] To that decision.

[110] Thus CLICO-Belize and the Defendant, as licenced insurance companies, may be taken to have had in place adequate and appropriate arrangements for reinsurance in respect of health insurance which it carried.

[111] Section 16(1)(a)(v) of the Act provides as follows:

> *"Subject to subsection (2), the Supervisor may notify in writing an insurance company licensed under this Act that he proposes to cancel its licence, giving his reasons for so doing (and notifying the company of its right under section 174 to request the Supervisor to refer his proposal for review by the Minister) if at any time*
>
> *(a) The Supervisor is satisfied that –*
>
> *(v) Any of its reinsurance arrangements are not satisfactory;"*

[112] As there is no evidence in the case of any such notification of cancelation of licence by the SOI it may be assumed that the Defendant was not liable to have its insurance licence canceled, or indeed had such licence cancelled for not having in place satisfactory reinsurance arrangements.

[113] Under Section 43(1) of the Act the SOI may require the Defendant, as a company licenced under the Act, or the director, manager, auditor, actuary or secretary to furnish him/her within a specified time such information as may be necessary to ascertain the ability of the Defendant to meet its obligations under policies issued by it. Under this section it is considered that this would cover any insurance policies which were transferred to the Defendant. Failure to comply with this provision would render any such company or officer liable to being charged with a criminal offence[10].

[114] Section 100 of the Act provides that:

> *"Every company carrying on long-term insurance business shall appoint an actuary, as a member of its staff or as a consulting actuary."*

[10] Section 43(2) of the Insurance Act, 2004.

[115] Section 102 of the Act provides that:

> *"(1) A company shall not issue any policy unless the rate of premium chargeable under the policy is a rate which has been approved by an actuary as suitable for the class of policy to which that policy belongs.*
> *(2) The Supervisor may at any time require the company to obtain and to furnish him with a report by an actuary as to the suitability of the rate of premium chargeable under any class of policy issued by the company and, if the actuary considers that the rate is not suitable, a report as to the rate of premium which the actuary approves as suitable in respect of that class of policy.*
> *(3) Where any requirement is made under subsection (2) in respect of the rate of premium chargeable under any class of policy, the company shall not issue any policy of that class until the company has, in accordance with the requirement, obtained the approval of the actuary for the rate of premium."*

[116] Thus under this section an actuary is required to approve a premium prior to any policy being issued.

[117] Section 104 of the Act provides that:

> *"(1) A company shall not issue or accept any form of proposal or policy unless the standard form has been approved by the Supervisor, and the Supervisor shall not approve any such form if it is not in compliance with this Act or if it is likely to mislead a proponent or policyholder."*

[118] This section would appear to prohibit a company from issuing or accepting any form of proposal or policy without the approval of the SOI and also requires, at minimum, that the proposal or policy must comply with this Act.

[119] Section 168 of the Act provides as follows:

> *"Failure on the part of a company to comply with any provision of this Act shall not in any way invalidate any policy issued by the company."*

[120] Section 170 – 174 of the Act requires that an insurance company, to transfer any class of insurance business (including health insurance business) to or with the insurance business of any other company, must do so pursuant to a scheme of transfer approved by the SOI, and sets out a procedure (including an appeals provision to the appropriate Minister) to be followed to obtain such approval and the effects of any such approved scheme.

[121] Specifically Section 172(1) (d) & (f) of the Act makes provision for schemes of transfers or amalgamation, and provides:

> *"Before a scheme for the transfer or amalgamation of the insurance business of a company is approved by the Supervisor –*
>
> *...*
>
> *(b) a copy of the scheme together with copies of the actuarial and other reports, if any, upon which the scheme was founded, shall be submitted to the Supervisor;*
>
> *...*
>
> *(d) notice of the intention to make the application the notice to contain such particulars as may be prescribed by the Supervisor) shall, not less than one month after the copy of scheme is submitted to the Supervisor, be published in the Gazette and in such local newspapers as may be approved by the Supervisor;...*
>
> *(e) the scheme shall be open for inspection by any policyholder or shareholder affected by it, for a period of fifteen days after the publication of the notice, at the office of each company engaged in the transfer or amalgamation;*
>
> *(f) the Supervisor, in the case of the transfer of long-term insurance business, may cause a report on the scheme to be made by an independent actuary and shall cause a copy of the report to be sent to each of the companies engaged in the transfer or amalgamation;*
>
> *..."*

[122] By Section 172(2) of the Act it is provided that:

> *"When approved by the Supervisor, the scheme shall be binding on all persons and shall have effect notwithstanding anything in the instruments constituting the company or in the articles of association or in any rules of the company and the directors of any company affected by the scheme shall cause a copy of the scheme to be filed with the Registrar of Companies."*

[123] Section 178(1) of the Act makes provision for the Minister to make regulations for giving effect to the Act (including the prescribing of anything required or permitted by the Act to be prescribed); but no such regulation has been made.

[124] Sections 182(1)(a) & (b) and 183 of the Act are the sections which create offences within the Act and provide as follows:

> *"Any company or person who –*
>
> *(a) Contravenes this Act, or any order or regulation made under this Act, or any direction or requirement given or made by the Supervisor (or persons authorized by him under section 4 (2));*
>
> *(b) Causes any person to enter into, or make an application for entering into, a contract of insurance in contravention of this Act;*
>
> *Commits an offence unless he can prove that he did not knowingly commit or cause such contravention or omission. Where the offence consists of a default in complying with any provision, direction or requirement, it shall be deemed to be a continuing offence so long as the default continues.*
>
> *(2) Where an offence under this Act or any Regulations made thereunder is committed by a body corporate, every person who at the time of the commission of the offence was a director, manager, secretary, principal representative or other similar officer of the body corporate, or was purporting to act in any such capacity, shall be deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he*

*exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.*

*…*

*(4) Notwithstanding any limitation on the time for the taking of proceedings which is contained in any Act, summary proceedings for offences against this Act may be commenced at any time within one year from the date on which there comes to the knowledge of the Supervisor evidence sufficient in his opinion to justify a prosecution for the offence.*

*(5) No such proceedings shall be commenced after the expiration of three years from the commission of the offence….*

*(7) Any proceedings against a company for an offence under this Act shall be without prejudice to any proceedings for the judicial management, or the winding up, of the company or of any part of the business of the company which may be taken in respect of the matter constituting the offence.*

*183. (1) All offences against this Act for which no penalty is prescribed shall be punishable on summary conviction, in the case of a body corporate, by a fine of twenty thousand dollars, and in the case of an individual, by a fine of five thousand dollars, or to imprisonment for a period of twelve months.*

*(2) In the case of a continuing offence, the offender shall, in addition to the penalty prescribed in subsection (1), be liable to a fine of five hundred dollars for every day during which the offence continues."*

Breach of Contract

[125] Although the Defendant denied that it unilaterally and unlawfully breached the Claimants' insurance contract there does not appear to be an issue between the parties as to whether the Defendant has in fact breached the insurance contracts

with the Claimants, by cancelling them (this appears to have been accepted by the Defendant).

[126] The issue appears to be whether such cancellation was lawful and/or legally justified. The Defendant has simply contended that the insurance contracts are illegal and unenforceable and by implication that the cancellation was thereby legal and legally justified.

[127] It therefore seems to me that it is unnecessary to deal with the legal question of breach of contract; and I will merely assume that if the Defendants are unsuccessful with their contentions, and that the Claimants have in fact proved that the contracts were cancelled (which I am content to do), that this aspect of the law has been satisfied.

Illegal Contracts

[128] Generally the law appears to be that the courts ought not to enforce a contract which is expressly or impliedly prohibited by law, or more specifically, by statute[11].

[129] Such prohibited contracts would therefore include a contract or policy of insurance lacking authorisation or approval as required by statute[12]. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable, whether the parties meant to break the law or not[13].

[130] The effect of a statutory prohibition is a matter of construction and in the present context construction of Section 104 of the Act (which is in identical terms as Section 97(1) of the 1975 Insurance Act).

[131] The principles of construction or interpretation applicable to the Insurance Acts, as commercial documents, have been authoritatively and succinctly been stated as follows:

[11] Volume 22 (2012) 5th Edition Paragraph 452 Halsbury's Laws of England.
[12] MacGillivaray On Insurance Law, Eleventh Edition Paragraph 14-003.
[13] Volume 22 (2012) 5th Edition Paragraph 452 Halsbury's Laws of England.

*"(i) the aim of the exercise is to ascertain the meaning of the relevant contractual language in the context of the document and against the background to the document. The object of the enquiry is not necessarily to probe the 'real' intention of the parties, but to ascertain what the language they used in the document would signify to a properly informed observer;*

*(ii) the interpretive exercise must not be done in a vacuum, but in the milieu of the admissible background material. That comprises anything that a reasonable man would have regarded as relevant in order to comprehend how the document should be understood, provided that the material was reasonably available to both parties at the time (ie up to the time of the creation of the document);*

*(iii) however, evidence of negotiations and subjective intent are not admissible for the purposes of this exercise;*

*(iv) a commercial document must be interpreted so as to make business common sense in its context. But if a 'detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense".*[14]

[132] In construing Section 104 of the Act what has to be considered is not merely what acts the statute prohibits, but what contracts (or in the present case) what policy of insurance it prohibits. The intent of the parties is irrelevant. If the parties enter into a prohibited contract or policy of insurance, that contract would be unenforceable[15].

[133] What is involved in a court determining whether it ought to strike down a contract or policy of insurance under the Insurance Acts? Where (as in the present case) the relevant provision of the Insurance Act contains no express provision

[14] See Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd and another [2013] EWHC 349 (Comm), 2011 Folio 1047 at para. 35.
[15] Volume 22 (2012) 5th Edition Paragraph 452 Halsbury's Laws of England.

regarding the contractual rights of the parties the first question is normally one of construction: does the Insurance Act intend to render the contract unenforceable or, does it intend (as it is often expressed) to prohibit the contract being entered into by one or both of the parties or does it merely intend to impose the penalty, if any, provided by it for contravention[16].

[134] This issue may arise in the context of the formation of the contract or policy of insurance (as in the circumstances of the present case) or it may arise in the context of its performance. If the formation of the contract is prohibited by statute neither party may enforce it[17].

[135] It is to be noted that the burden of proving illegality, where it is alleged by the insurers, lies upon them to prove it, and that the presumption is always against illegality[18].

**The factual and legal contentions of the parties to the proceedings**

The Claimants' Contentions

[136] The Claimants contend that the termination by the Defendant of the Claimants´ insurance contract is unlawful in that:

(a) It is in violation of the terms of the insurance contract;

(b) It is in breach of the Insurance Act, Chapter 251 of the Revised Edition 2000, Laws of Belize.

(c) The insurance contract is not subject to or conditional upon whether or not the Defendant obtains or maintains a contract of reinsurance on the Claimants´ risk.

[137] The Claimants do not dispute the well-established legal principle that the Claimants' insurance contracts, like all contracts, may be invalidated if they contravene relevant legislative provisions.

[138] However, crucially, the Claimants contend that in these proceedings the Defendant has failed to discharge its burden of proving that the Claimants'

[16] Volume 22 (2012) 5th Edition Paragraph 453 Halsbury's Laws of England.
[17] Ibid.
[18] MacGillivaray On Insurance Law, Eleventh Edition Paragraph 14-029.

insurance contracts were not approved by the SOI in violation of the Insurance Acts.

[139] The Claimants contend that it is clear on the evidence adduced at trial that at all material times the Claimants were neither party nor privy to any discussion between the Defendant, their agents, the Judicial Manager, or the SOI, and would not have known of the alleged illegality or alleged directive of the SOI and that no information or documentation in this regard was ever made known to the Claimants.

[140] In the circumstances, the Claimants contend that they still do not know if their policies were determined to be illegal by the SOI as between the SOI and the Defendant, and if so, in what regard or for what reason their policies were deemed illegal, and/or to what extent this was so.

[141] The Claimants contend, therefore that the Defendant has not adduced the required evidence, and has not made a claim against any other person, notwithstanding its reference to persons upon whose advice it claims to have acted.

[142] Indeed, it was also contended by the Claimants that it is also apparent from the evidence that the Actuary Paul Ngai never reviewed the Public Health Plan Policy, Rosendo Santana's policy, and did not recommend the cancellation of that particular policy or class of policies.

[143] Furthermore, the Claimants contend, that even if this Court determines that the allegation of illegality is adequately substantiated on the evidence, which the Claimants deny, it is their contention that pursuant to the provisions of the Acts, the Claimants' insurance policies are enforceable and were therefore unlawfully cancelled.

[144] The Claimants also contend, without prejudice to their foregoing contentions, that their insurance contracts are valid and enforceable because on the true construction of the Act, the Claimants are not deprived of their insurance policies even where a breach of section 104 is established.

[145] It is contended by the Claimants that it is clear that the Insurance Acts must be properly construed to determine what is the effect of a breach of section 104 (on the contractual rights of the Claimants), and that from the scope of the express provisions of the Insurance Acts, that section 104 was intended to protect policyholders by ensuring the integrity of their policies, ensuring that policyholders would not be misled as to their policy, and to penalize the insurance company and its complicit officers for breaches of statutory provisions.

[146] It is therefore contended by the Claimants that the Act neither expressly nor impliedly provides that an insurance policy in breach of section 104 is unenforceable or that the insured under such a policy would lose his protection thereunder.

[147] Also it is contended that, as is shown by the statutory provisions set out above, only the insurer – and not the insured person - is liable to penalties for breach of section 104.

[148] Finally the Claimants pray in aid the fact that it is common ground in these proceedings that the insurance policies in question are not contracts with a purpose which is (presumably as a matter of fact and law) illegal or contrary to public policy, and that these contracts were fully performed by the parties for at least six years.

The Defendant's Contentions

[149] The Defendant, relying mainly on the Act, advances the following legal propositions:

(a) Insurance business in Belize is regulated by the Act and is subject to the statutory restrictions which provides for the persons by whom or the manner in which insurance business may be carried on.

(b) Insurance companies in Belize are recognized as having reinsurers.

(c) An insurance company carrying on long-term insurance business must have an actuary.

(d) An actuary must approve the rate of premium charged under a policy.

(e) The SOI must consider an actuarial report before approving a scheme for the transfer or amalgamation of the insurance business of a company.

(f) It is illegal for an insurance company in Belize to issue an insurance policy that has not been approved by the SOI.

(g) That at common law contracts made contrary to statute are illegal[19]. The court will not enforce a contract which is prohibited by statute.

(h) A contract, whose formation is prohibited by statute, is unenforceable[20].

[150] The Defendant contends, that as borne out by the evidence of the Claimants, the Claimants received insurance coverage for the premiums paid during the existence of their contract with CLICO-Belize; and it is not the case that the Claimants paid insurance premiums to CLICO-Belize and never received coverage. The Defendant, recognizing that it could not offer the insurance coverage that CLICO-Belize had been offering, has not accepted any premiums from the Claimants.

[151] The loss therefore suffered by the Claimants, it is contended by the Defendant, is the benefit of an illegal contract, which despite the best efforts of the Defendant to secure alternative coverage for the Claimants on the same terms and at the same rate as they previously had, they have been unable to do; and that the Claimants are unlikely to be able to secure coverage from any other insurance company in Belize on the same terms as they had with CLICO-Belize.

[152] The Defendant further contends that the inability of the Claimants to secure such favourable policies elsewhere underscores the irregularity in the policies held with CLICO-Belize and might be indicative of CLICO-Belize's indiscretion in offering those policies.

[153] The Defendant contends that as the Defendant is the only party liable for the statutory offence resulting from the parties having entered into a contract of insurance in contravention of the Act, the Defendant ought not to be penalized for

[19] Halsbury's Law of England, Contract, Vol. 22 (2012), 5th Edition, para. 424

[20] See Halsbury's Law of England, Contract, Vol. 22 (2012), 5th Edition, para. 453. Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277, [1939] 1 All ER 513, PC. Re Mahmoud and Ispahani [1921] 2 KB 716, CA

complying with the provisions of the Act which governs the industry in which it operates.

[154] Finally the Defendant contends that the Claimants as Belizeans are deemed to know the law and are seeking to enforce illegal contracts to which this Court ought not to give effect, and that enforcement of the illegal contracts would be to reward the Claimants for its contravention of the Insurance Act and punish the Defendant for refusing to acquiesce in its contravention[21].

**The Issues**

[155] It is a matter for consideration by this court, as questions of law:

(a) What, if any, are the minimum requirements for health insurance under Section 97(1) of the 1975 Insurance Act and Section 104 of the Act, and how are such provisions to be construed generally?

(b) Whether the SOI has or has not approved any such form or policies of (in this case health) insurance?

(c) Whether the SOI's power under these sections is limited to considerations of any provisions in these Acts and also the likelihood of such form or policy misleading a proponent or policyholder?

(d) Whether the termination (cancelation) by the Defendant of the Claimants´ insurance contract was unlawful on the facts of the case?

(e) Whether the Defendant has discharged its burden of proving that the Claimants' insurance contracts were not approved by the SOI and were therefore in violation of the Insurance Acts?

(f) Whether the subject policies were determined to be illegal by the SOI and the Defendant, and, if so, in what regard or for what reason such policies were deemed illegal, and to what extent this was so?

(g) Whether pursuant to the provisions of the Acts, the Claimants' insurance policies are enforceable and were therefore unlawfully cancelled?

[156] It is also to be determined by this court whether the SOI by the scheme of transfer which was approved thereby approved the transfer of CLICO-Belize's portfolio to

[21] CCJ Appeal No CV 7 of 2012, BCB Holdings Ltd. et. al v A.G of Belize See Para 61.

the Defendant; and if so whether it did so with or without any reservation concerning the policies the subject matter of the present claims?

**Analysis of Fact and Law and final Determination in relation to the Case.**

[157] The facts and circumstances of the decision of Action No. 12 of 2010 provides some background to the present proceedings.

[158] The terms of provisions in the Insurance Acts are identical insofar as they prohibit the issue of insurance policies without the approval of the SOI.

[159] It is clear to me that on the facts of the case and a careful construction of the relevant provisions of the Insurance Acts the alleged prohibited action by the insurance company is the issuing or accepting of proposals or policies of insurance (including health insurance) without approval by the SOI. The answer to me to this question appears clear and unambiguous.

[160] There was no evidence in the case from the SOI and from the evidence that there was it is clearly the case that I have to assume and ought to conclude that the subject health insurance policies were both issued and accepted by CLICO – Belize, the predecessor in title of the Defendant (in whose shoes the Defendant stands). There is no evidence before the court that the SOI prior to the issue or acceptance of these policies (the subject of the present claims) had failed to approve such policies or proposals.

[161] I accept there is a general piece of evidence that the SOI had not approved "many of the policies sold by CLICO-Belize". But in my view this piece of evidence does not amount to proof of the absence of approval by the SOI of the policies of insurance the subject of the present proceedings. On the contrary this evidence ought to have alerted the Defendant to conduct very careful and due diligence in relation to the CLICO-Belize policies, including in relation to the subject health insurance business, and that arising from such due diligence to take appropriate action prior to taking a transfer these policies – by seeking to except any such policies from being transferred to it.

[162] In my view it was not in the power of the SOI subsequent to the issue of the subject policies and after their transfer to the Defendant to dis-approve or withdraw any approval for the subject policies. In any event I am not satisfied by the evidence in the case which suggested that in fact this was done. In my view it would have been desirable for there to have been some evidence from the SOI setting out her position on this very important matter and for the court not to have to rely on any testimony by the Defendant. Certainly there was nothing in writing from the SOI which would have gone some way to allay the concerns of this court.

[163] There could have been evidence placed before the court that:

(a) the SOI had notified in writing CLICO-Belize or the Defendant that she proposed to cancel its licence as she is satisfied that its reinsurance arrangements are not satisfactory[22].

(b) the SOI required the CLICO-Belize or the Defendant to obtain and to furnish him/her with a report by an actuary as to the suitability of the rate of premium chargeable under the health insurance policies in question and that the actuary considered that the rate was not suitable[23].

(c) at the transfer of the life insurance policy in question the SOI could have denied his/her approval of such life insurance policies when the scheme for such transfer was approved[24].

[164] I have also carefully considered in what ways the subject health insurance policies were not, or may not have been, in compliance with the Insurance Acts prior to the issue or acceptance of the policies or proposals relating to them; or may otherwise mislead a proponent or policy-holder.

[165] Non-compliance with the Act, in my view, could have taken a number of forms including the following:

[22] In accordance with Section 16(a)(v) of the Insurance Act 2004.
[23] In accordance with Section 102 of the Insurance Act 2004.
[24] In accordance with Section 170 – 172 of the Insurance Act, 2004.

(a) The company had not made adequate and appropriate arrangements for reinsurance[25].

(b) The rate of premium chargeable under the policy was not a rate which had been approved by an actuary suitable for such health insurance being the class of policy to which that policy belongs[26].

[166] I have found no evidence that prior to the issue or acceptance of a proposal or policy for the subject health insurances that there was any non-compliance with the Acts.

[167] In arriving at this conclusion I have borne in mind that the burden of proving illegality, as it has been alleged by the Defendant as the insurers, lies upon the Defendant to prove such illegality; and I have kept at all times upmost in my mind that there exists always a presumption against illegality.

[168] This court therefore can only assume that there was regularity and compliance with the Acts in the absence of any such proof to the contrary.

[169] I have also found no, or no sufficient evidence, that prior to the issue or acceptance of a proposal or policy for the subject health insurance that there was in any form a proposal or policy which was likely to mislead a proponent or policyholder. Indeed I could not find in the evidence anything which was said or done which might be so misleading.

[170] Again this court, therefore, can only assume that there was regularity and compliance with the Acts and with the forms as required by the Acts in the absence of any such proof to the contrary.

[171] In the above circumstances I could not and did not find that the subject policies were contracts which were expressly (or indeed impliedly) prohibited by the Insurance Acts on the basis that such policies had not been authorized by SOI.

[172] In addition I considered, in the event that I am wrong in relation to the last mentioned finding that the health insurance policies in question were indeed unauthorized or not approved by the SOI, what would be the position in relation

[25] In accordance with Section 16(1)(a)(v) of the Insurance Act, 2004.
[26] In accordance with Section 102 of the Insurance Act, 2004.

to such policies; and what would be the effect of the statutory prohibition, as a matter of construction.

[173] In this regard I considered not merely what the Insurance Acts prohibit, but what contracts, (or in the present case) what policies of insurance it prohibits (absent the intent of the parties) with a view to considering whether this court ought to strike down the subject contract or policies of insurance under the Insurance Acts, and I looked to see whether the relevant prohibiting sections of the Insurance Acts contained an express provision regarding the contractual rights of the parties.

[174] In all the circumstances of the case I find, on a careful construction of the applicable provisions, that the Insurance Acts did not intend to render the contract unenforceable, principally because it is not expressed to prohibit the insurance contracts or policies in so far as the Claimants are concerned; but concluded that such provisions merely intended to impose a penalty on CLICO-Belize (or the Defendant standing in its shoes). These provisions are clearly and mainly, in my view, expressed to be for the benefit of the Claimants.

[175] It was also noted by me that the present matters under consideration arise in the context of the formation of the contract or policies of insurance (as in the circumstances of the present case) and not in its performance, and it was observed by me that:

(a) the Defendant and its predecessor in title CLICO-Belize both issued and accepted the policies in question.

(b) the policies were performed by the parties for many years and the problems only arose after such policies had been transferred to the Defendant.

(c) by acquiring the CLICO-Belize policies (including the subject insurance policies) the Defendant, it appeared to me, accepted the risks involved in taking on such policies.

[176] In the circumstances I have determined and I am prepared to declare that the Defendant unilaterally and unlawfully breached the Claimants' insurance contracts with the Defendant in the following respects:

1) The Defendant terminated the Claimants' policy unilaterally and without the consent or knowledge of the Claimants, and had no lawful justification to do so.
2) The Defendant terminated the Claimants' policy in a manner not permitted by the Policy and in the absence of any breach, want of good faith or misstatement or non-disclosure by the Claimants.
3) The Defendant acted in breach of section 101 of the Insurance Act in denying its obligation and liability to the Claimants in circumstances where the Claimants made no untrue statement or non-disclosure of any matter relating to their state of health for purposes of their insurance coverage.
4) The Defendant wrongly excluded liability under the Policy for Sergio's obesity when it was covered under the Claimants' policy, and it was not a pre-existing condition for the purposes of the Policy.
5) The Defendant unlawfully required the Claimants to apply for alternative and inferior insurance coverage.
6) The Defendant required the Claimants to apply for alternative and inferior insurance coverage and then declined them that coverage.
7) The Defendant terminated Sergio's policy on the basis that reinsurance was not available for his condition and that its actuaries had advised that the policy be discontinued.
8) The Defendant failed or refused to provide medical insurance coverage for Rosendo's lumbago, when it was not a pre-existing condition for the purposes of his policy.

[177] I find that Sergio has suffered:

1) Loss of insurance coverage for obesity

2) Impossibility of securing alternative insurance coverage for his condition on the same terms as to cost and coverage or at all.

Sergio is therefore entitled to an order that his Insurance contract be reinstated subject to Sergio paying all outstanding premiums or alternatively damages for breach of contract.

[178] I find that Rosendo has thereby suffered:

1) Loss of medical coverage including for lumbago
2) Impossibility of securing alternative insurance coverage for his medical condition on the same terms as to cost, coverage and conditions.

Rosendo is therefore entitled to an order that his Insurance contract be reinstated subject to Rosendo paying all outstanding premiums, or alternatively damages for breach of contract.

**Costs**

[179] In the circumstances of my findings on the case I find that the Defendant shall pay the Claimants' costs agreed by the parties in the sum of $12,500.00.

**Disposition**

**[180]** For the reasons given above, I make the orders in the above terms.

**The Hon Mr. Justice Courtney A. Abel**